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March 12, 2007

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Opinion

Case Name: Personnel Security Hearing

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Case Number: TSO-0307

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance). A Department of Energy (DOE) Operations Office determined that information in its possession created substantial doubt about the individual's eligibility for an access authorization under the DOE regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be granted. As set forth in this decision, I have determined that the individual's access authorization should not be granted at this time.

**I. Background**

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

In 1985, DOE granted the individual an access authorization which he held during a ten-week student internship at a DOE facility. Eighteen years later, in 2003, the individual was hired once again at a DOE facility, and his employer sought to reinstate his access authorization. In the course of processing the request for reinstatement, the local DOE security office (DOE Security) uncovered derogatory information that it was unable to

resolve through a Personnel Security Interview (PSI). Consequently, it initiated formal administrative review proceedings. In a Notification Letter issued to the individual on September 9, 2005, DOE Security stated that it was unable to reinstate the individual's access authorization pending the resolution of certain derogatory information that falls within the purview of three potential disqualifying criteria, Criteria F, K and L.<sup>1</sup>

After receiving the Notification Letter, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On November 16, 2005, the Director of the Office of Hearings and Appeals appointed me the hearing officer in this case. After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, I established a hearing date. At the hearing, the individual testified on his own behalf, and called as witnesses his wife, four friends and co-workers, and a drug and alcohol counselor. The transcript taken at the hearing will be hereinafter cited as "Tr." Various documents that were submitted by the DOE Counsel will be cited in this decision by their descriptions.

## **II. Standard of Review**

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below

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<sup>1</sup> Criterion F relates to information that a person "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization or proceedings conducted pursuant to § 710.20 through 710.31." 10 C.F.R. § 710.8(f). Criterion K relates to information that a person "possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." Criterion L relates, in relevant part, to information that a person "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . ." 10 C.F.R. § 710.8(l).

reflects my application of these factors to the testimony and evidence presented by both sides in this case.

### **III. Findings of Fact**

This case involves the individual's use of illegal drugs, with varying frequency, throughout much of his adult life. This case also involves the individual's intentional denial of his illegal drug use on DOE Security questionnaires. The facts in this case are essentially uncontroverted.

The individual completed three questionnaires for DOE access authorization: a Personnel Security Questionnaire (PSQ) in 1985, a Questionnaire for National Security Positions (QNSP) in 2000, and a QNSP in 2003. Each of these forms contained a question requiring the applicant to state whether he had used illegal drugs, and on each form, the individual responded that he had not. *See* 1985 PSQ, Question 11 ("Are you now, or have you ever been, a user of a narcotic, hallucinogen, stimulant, depressant, or cannabis (to include marijuana and/or hashish), except as prescribed by a licensed physician?"); 2000 and 2003 QNSPs, Question 24a ("Since the age of 16 or for the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?"). Before completing each of the 2000 and 2003 QNSPs, the individual had signed (1) a Security Acknowledgment form instructing him that using illegal drugs could result in loss of access authorization, and (2) a certification that he had read and understood a letter containing DOE's policy on falsification, which included potential criminal prosecution for providing false information as well as possible denial of a request for access authorization.

The individual first acknowledged his use of illegal drugs during a routine background investigation that was conducted in response to his 2003 request for reinstatement of his access authorization. During an interview conducted in October 2004 by a background investigator for the Office of Personnel Management (OPM), the individual admitted that he had used illegal drugs, starting in high school and ending in February 2002. At a DOE personnel security interview in 2005 (the 2005 PSI), the individual gave the interviewer a detailed history of his use of illegal drugs. He stated that he began smoking marijuana in high school, as often as several times a week. He also experimented a few times each with cocaine, mushrooms and LSD in high school, but never used any of them beyond high school. In college, he used marijuana intermittently, sometimes as often as once or twice a week. After college, the individual's use of marijuana tapered off to no more than once every few months. During graduate school, his frequency of use increased again to several times a month, though again on an intermittent basis. After graduate school, the individual married, and thereafter smoked marijuana infrequently and by himself, away from his wife and children, in the garage or shed. In March or April 2003 he stopped all use of marijuana, without the benefit of therapy or counseling.

The individual also acknowledged at his 2005 PSI that he had deliberately denied any illegal drug use from 1985 through the date of the interview. He expressed regret for having withheld pertinent information, and offered as explanation for his actions his fear that his drug use would negatively influence DOE's decision regarding his access authorization.

#### **IV. Analysis**

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.<sup>2</sup>

##### **A. Criterion F**

###### **1. The Allegations and Associated Security Concerns**

With respect to Criterion F, DOE Security alleges in its Notification Letter that the individual deliberately omitted his illegal drug use on three security forms he submitted over an 18-year period, most recently in 2003. The individual has admitted that he intentionally omitted this information. I find that the individual's failure to provide full, frank and truthful responses on these questionnaires raises questions about his reliability, trustworthiness and ability to protect classified information. *See* Guideline E (15) of the Adjudicative Guidelines. For this reason, I find that DOE Security properly invoked Criterion F as a basis for not granting the individual an access authorization.

###### **2. Mitigating Evidence Regarding Criterion F Allegations**

At the hearing, the individual stated that he denied using illegal drugs on the 1985 and 2000 questionnaires because he was embarrassed and ashamed of his actions and feared that he would not get the position he sought if he had told the truth. Tr. at 16, 23. As for his lying on the 2003 questionnaire, he explained that he knew he did not need an access authorization to hold the position he sought; nevertheless, he was embarrassed and ashamed of using marijuana. Tr. at 30. Both he and his wife testified that it was easier for him to admit his marijuana use in 2004 than in earlier years, because he did not need access authorization.<sup>3</sup> Tr. at 34, 93-93. In his favor, he admitted his marijuana use to the OPM investigator in 2004 voluntarily, and he claimed at the hearing that DOE Security

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<sup>2</sup> In its Notification Letter, DOE Security does not specify the derogatory information that supports its Criterion L concerns. The only concerns expressed in that letter stem from the individual's use of marijuana and his deliberate omissions of his illegal drug use on the DOE security forms. For this reason, I find that any Criterion L concerns are subsumed in the Criteria F and K concerns and need not be addressed separately in this decision.

<sup>3</sup> The individual's employer seeks access authorization for him because it would permit him to work on certain projects from which he was currently excluded, but it is not a job requirement.

would never have learned of his drug use if he had not come forward on his own with the information. Tr. at 32. He also admitted that it was bad judgment to provide false information to DOE Security. Transcript of 2005 PSI at 50; Tr. at 54. He further testified that it was stressful to maintain his secret regarding marijuana use. Tr. at 34. Finally, there is no evidence in the record that the individual has engaged in any other forms of misrepresentation to DOE Security, or in any misrepresentation of his former illegal drug use since he came forward with the truth in 2004.

### 3. Hearing Officer Evaluation of Criterion F Evidence

Cases involving verified falsifications are difficult to resolve because there is no definitive guidance as to what constitutes rehabilitation from lying. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the falsification and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether granting or restoring the security clearance would pose a threat to national security. Hearing Officers have generally taken the following factors into account in resolving matters of falsification and their bearing upon the eligibility of an individual to hold a security clearance:

[W]hether the individual came forward voluntarily to renounce his falsifications appears to be a critical factor. *Compare Personnel Security Hearing*, Case No. VSO-0037, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA Feb. 22, 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing*, Case No. VSO-0327, 27 DOE ¶ 82,844, [*affirmed*, 28 DOE ¶ 83,005 (2000), *affirmed* (OSA August 4, 2000)] (falsification discovered by DOE security). Another important consideration is the timing of the falsification: the length of time the falsehood was maintained, whether a pattern of falsification is evident, and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327 (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). *See also Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999), [*affirmed*, 27 DOE ¶ 83,025 (2000), *affirmed* (OSA May 18, 2000)] (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use).

*Personnel Security Hearing*, Case No. VSO-0319, 27 DOE ¶ 82,851 at 86,099 (2000), *affirmed* (OSA July 18, 2000); *see also Personnel Security Hearing*, Case No. VSO-0466, 28 DOE ¶ 82,829 (2001), *affirmed* (OS April 3, 2002). After applying these factors to the present case, I have determined that the individual has not mitigated the concerns of DOE Security.

The individual falsified his use of marijuana and other illegal drugs in response to questions DOE Security posed from 1985 through 2003. This history presents a pattern of willful misrepresentation that spans at least 18 years. The individual made a conscious decision to correct his error in 2004, and the evidence indicates that he has been truthful

in his dealings with DOE Security since that time. By the time of the hearing, nearly a year and a half had transpired since he corrected his misrepresentations to the DOE Security. After such a long pattern of withholding information from DOE Security, however, I cannot find that the relatively short duration of candor is sufficient to mitigate DOE Security's concerns under Criterion F.

Moreover, I remain troubled by the individual's apparent motivation to correct his falsifications. Although he came forward before he was confronted with the truth, he appears to have chosen his moment with great calculation, rather than out of a sudden realization that the success of the access authorization program depends on his being open and honest in his dealings with DOE Security. Because the individual was alerted to the DOE's lack of tolerance of falsification in Security Acknowledgment forms he signed in 2000 and 2003, he has been well aware for a number of years of DOE Security's need for honest and reliable information. The evidence nevertheless tends to demonstrate that he made his disclosures at a time when he thought any adverse effect on his application for access authorization would be minimal. Both he and his wife testified that there was less at stake in 2004 than earlier, because his position was not dependent on access authorization. In 2004, he admitted to the OPM investigator that he had been using marijuana but had stopped in 2002, two years before. In 2005, he admitted the same at the PSI, but stated that he had stopped in 2003, two years before. At the hearing, when asked why he "came clean," the individual replied,

I came clean because I think eventually it might come out . . . especially if I needed higher and higher levels of clearance. And then that would have been a more severe impact to my career and to my clearance than if I admit at this point. It was only seeming to me to potentially get worse, even though I had a chance of getting away with it.

Tr. at 34. It is clearly to his credit that the individual did come forward and correct the false information he provided to DOE Security. Nevertheless, the circumstances under which he did so do not inspire me with confidence that the individual is not withholding other critical information from DOE Security, waiting until another carefully calculated period of time passes, so that its disclosure will not have an adverse effect on his access authorization. Applying comprehensive, common-sense judgment to the facts before me, I cannot find that the individual has mitigated DOE Security's concerns under Criterion F.

## **B. Criterion K**

### **1. The Allegations and Associated Security Concerns**

To support its concerns under Criterion K, DOE Security alleges in its Notification Letter that the individual used marijuana occasionally and experimented with cocaine, mushrooms, and LSD while in high school. During the 2005 PSI, the individual revealed that he smoked marijuana intermittently while in college, some weeks as often as once or twice a week. His marijuana use tapered off after college, but then increased to several

times a month, intermittently, while he was in graduate school. Since his marriage in the early 1990s through 2003 (possibly 2002), he smoked marijuana occasionally, generally alone in his garage, away from his family.

The security concerns surrounding the use of illegal drugs are twofold. First, when an individual is under the influence of illegal drugs, his judgment may be impaired, which in turn might cause him not to properly safeguard classified materials. Second, using illegal drugs is a violation of law and may indicate a willingness to disregard other laws and rules, including those pertaining to the safeguarding of classified materials. *See* Guideline H (24) of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). In this case, I find that the individual's long history of illegal drug use, followed by a relatively short period of abstinence, raises questions about his reliability, trustworthiness and willingness to comply with laws, rules and regulations. For this reason, I find that DOE Security properly invoked Criterion K as a basis for not granting the individual an access authorization.

## 2. Mitigating Evidence Regarding Criterion K Allegations

At the 2005 PSI, the individual told DOE Security that he refrained from using any illegal drugs during the three months he held an access authorization in 1985. Transcript of 2005 PSI at 43-44. The individual argued that this restraint demonstrated his serious commitment to security practices. *Id.* at 43. He also stated that those three months were among many when he did not use any marijuana at all.

At the hearing, the individual testified that he limited his use of illegal drugs to marijuana after high school, and stopped using marijuana in March or April 2003. Tr. at 26. He stated that he chose to stop smoking marijuana at that time, because he was re-entering the job market after running his own business, and he believed that many employers were requiring pre-employment drug testing. Tr. at 27. His wife corroborated her husband's fear of drug testing prompted him to curtail his drug use. She added that he "just got tired of it" and stopped smoking marijuana. Tr. at 90. She expressed her opinion that he was not addicted to marijuana because he accomplished this goal with no difficulty, without any counseling or treatment. Tr. at 91.

The individual consulted with a substance abuse counselor, certified as a social worker, to obtain a professional opinion as to his prior substance use, in an attempt to mitigate DOE Security's concerns with respect to his past use of marijuana. At the hearing, the substance abuse counselor testified that she took the individual's history, administered psychological assessment tests, and referred him for a chemical dependency assessment. Tr. at 105-06. She testified that it was to the individual's credit that he sought the assessment voluntarily, and that he was cooperative, open, and honest during the process. Tr. at 111. Because the counselor had not received the results of the chemical dependency assessment at the time of the hearing, I left the record open for the counselor to submit her assessment after she received those results. In her assessment report, the

counselor expressed her opinion that the individual “does not meet any of the diagnostic criteria that would indicate a substance abuse or dependence problem in the past 12 months.” Indiv. Post-Hearing Submission, 2/15/2006. She stated that the individual’s “diagnosis is as follows: past history of cannabis abuse and alcohol abuse: sustained full remission.” The counselor’s only recommendation for treatment was education on low-risk drinking, which she stated he had completed before she issued her report. *Id.*

### 3. Hearing Officer Evaluation of Criterion K Evidence

When the individual first disclosed his illegal drug use, he stated to the OPM investigator that he had stopped using marijuana in February 2002. During his 2005 PSI and at the hearing, the individual stated that he last smoked marijuana in March or April 2003. Although the individual has provided discrepant dates for his last marijuana use, it does not appear that he has used marijuana since March or April 2003. His friends and co-workers testified that they had never known that he used marijuana until he admitted it to them. Their testimony comports with the individual’s explanation that since his marriage in 1992 he generally smoked marijuana by himself, away from the family. His expressed motives for discontinuing marijuana use are convincing: he feared he might test positive on employment-related drug assays, and he feared that his children might discover his habit. Apparently, the stress of keeping his habit a secret simply outweighed any benefits he was enjoying from smoking marijuana.

The individual has presented several factors that tend to mitigate DOE Security’s concerns about his illegal drug use. It appears that he no longer uses any illegal drugs, and has not since at least early 2003. It also appears that the individual is not addicted to any illegal drugs, based on his wife’s testimony that he had no difficulty stopping once he made that decision and the testimony of the counselor that he does not currently suffer from substance abuse. I have no doubt that his fear of being discovered was a powerful incentive to stop smoking marijuana. The fact that the individual did not seek treatment or counseling to reach his goal of abstaining from marijuana use has neutral weight in my opinion. On the one hand, it demonstrates that he did not recognize that he had a problem that required treatment. On the other, he was apparently correct, because there is no evidence or allegation of any illegal drug use since he decided to quit, and the only professional opinion expressed in this proceeding is a diagnoses of “cannabis abuse in past, by history, in full remission.” In light of the individual’s cessation of marijuana use and the favorable opinion of a mental health professional, I conclude that the individual has adequately demonstrated that he has broken his pattern of illegal drug use.

Nevertheless, I am not convinced that the individual has resolved DOE Security’s concerns rising from his past behavior with respect to illegal drugs. Although I find that the individual has abstained from all drug use since 2003, I must compare that period to a period of over 20 years during which he did use illegal drugs. His period of abstinence is relatively short, and his motivation for abstinence, while strong, appears to be guided more by fear of being caught than by a desire to be straightforward. If he were assured that his marijuana use would not be detected, for example, if he is not currently subject to random drug testing, he might be inclined to resume smoking marijuana in a very



cautious manner. My lingering doubts about the individual's future behavior regarding marijuana require me to err on the side of caution and find against the individual on Criterion K.

## **V. Conclusion**

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8(f) and (k) in determining that it could not reinstate the individual's access authorization without resolving concerns raised by derogatory information it received regarding the individual. For the reasons I have described above, I find that the individual has not sufficiently mitigated the security concerns raised under Criteria F and K. I therefore do not find that reinstating the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted at this time. The individual may seek review of this Decision by an Appeal Panel under the provisions set forth at 10 C.F.R. § 710.28.

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date: March 12, 2007